APPENDIX

Statutes and Rules Involved

National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, et seq.)

Sec. 2. (8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted

by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

Sec. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or

is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

Sec. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act [U. S. C., Supp. VII, title 15, sec. 707 (a)], as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" [48 Stat. 922, pars. (l) and (m)], as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

Judicial Code, Section 117 (U. S. Code Annotated, Sec. 212)

There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.

Rules of the United States Circuit Court of Appeals for the Third Circuit, Rule 4 (1)

1. THE COURT—JUDGES WHO CONSTITUTE IT—NUMBER OF JUDGES TO SIT. The court consists of the circuit justice, when in attendance, and of the circuit judges of the circuit who are in active service. District judges and retired circuit judges of the circuit sit in the court when specially designated or assigned as provided by law. Three judges shall sit in the court to hear all matters, except those which the court by special order directs to be heard by the court en banc.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 307

NEWARK MORNING LEDGER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the three-judge court below (R. 27–32)[1] is reported at 120 F. (2d) 262. The opinions of the court below, sitting *en banc* on rehear-

[1] Pursuant to stipulation of the parties (R. 77–78), the printed record herein for purposes of the petition for certiorari consists of: (1) the appendix to the Board's brief filed in the court below, which will be designated by the symbol (B. A.); (2) the appendix to petitioner's brief filed in the court below, which will be designated by the symbol (P. A.); (3) the proceedings in the court below, which will be designated by the symbol (R).

ing (R. 46–66), are reported at 120 F. (2d) 266. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 384–417) are reported at 21 N. L. R. B. 988.

JURISDICTION

The decree of the court below (R. 67–68) was entered on May 2, 1941. A petition for modification of the decree filed by petitioner (R. 69–73) was denied on May 20, 1941 (R. 76). The petition for a writ of certiorari was filed on July 24, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether a circuit court of appeals may be composed of all the circuit judges in active service sitting *en banc*.

2. Whether the existence of a collective bargaining agreement between an employer and his employees deprives the National Labor Relations Board of jurisdiction to maintain proceedings under the National Labor Relations Act to prevent employer conduct otherwise violative of the Act's prohibitions.

3. Whether, in an unfair labor practice case, the existence of a sufficient public interest is a necessary condition to the Board's maintenance of proceedings under the Act, and, if so, whether the Board's determination of that preliminary issue is subject to judicial review.

4. Whether there is substantial evidence to support the Board's findings that petitioner discriminatorily discharged an employee in violation of Section 8 (3) and (1) of the Act.

5. Whether the case should have been remanded to the Board to determine the specific amount of back pay due and any amount which the employee failed without excuse to earn.

6. Whether the cease-and-desist provisions, to the extent enforced by the court, and the notice provisions of the Board's order are proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to the petition (pp. 31–33).

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (B. A. 384–417). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

For more than two years after June 1935, the Newark Newspaper Guild, a labor organization representing petitioner's employees, unsuccessfully sought a collective agreement with petitioner; throughout the period petitioner consist-

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

ently evidenced antagonism to the Guild.[3] On August 12, 1937, petitioner and the Guild entered into a collective agreement which, among other things, prohibited discrimination by the employer on account of membership or activity in the Guild (B. A. 401; P. A. 147, B. A. 367). On September 22, 1937, petitioner published an anti-Guild editorial (B. A. 403–405, 414; B. A. 360–363); on the same day it discharged Agnes Fahy, an editorial employee with third highest seniority (B. A. 405, 409–410; B. A. 106–107, 62–63). Fahy had been an officer of the Guild and had become its president in August 1937. She was an advocate of a vigorous trade-union policy in respect of the Guild's dealings with petitioner, and was a leader of the Guild activities which petitioner had opposed during the preceding two years. At the time of her discharge, she was the only person

[3] Petitioner's managing editor inveighed against the Guild and cautioned employees against Guild membership (B. A. 390–392, 413; B. A. 45, 48–51, 57–58, 61, 116–119, 124–126, 128–129, 135–136, 138–139); petitioner withheld unqualified recognition though the Guild admittedly represented a majority of the employees in an appropriate unit (B. A. 392–394, 395–396; B. A. 54–55, 94, 107, 219–220, 244, 272–274, 278–279, 335, 379); petitioner undercut the Guild's authority by entering into individual contracts with Guild members (B. A. 395, 397–400, 413; B. A. 60, 74–75, 131, 147, 158, 160, 162, 193–194, 274–275, 341, 358); and petitioner financed the unsuccessful efforts of its city editor to resist by legal process his ouster from the Guild (B. A. 401–403, 413; B. A. 37, 55–56, 71, 114–115, 118–120, 134–135, 212, 216–218, 220–221, 227–228, 258–259).

still employed among those who had adhered to the position that the Guild should oust petitioner's city editor from membership in the union. (B. A. 405–409; B. A. 40–42, 66–77, 80–81, 85–86, 89, 104–105, 110–111, 115, 120–121, 212–213, 218, 240, 247–249, 317–318, 343, 345–350.) Petitioner's explanation that Fahy was discharged to reduce expenses and because she was incompetent is not supported by the evidence (B. A. 409–412; B. A. 62–66, 81–85, 88, 96–99, 119, 151–152, 175–180, 188, 197–199, 201–209, 224–226, 230–234, 250–257, 266–267, 301, 305, 309–317, 323, 340–341, 368–369, 370–372, 377–378, 380).

The Board accordingly rejected the explanations assigned by petitioner for Fahy's discharge, and found that she had been discriminatorily discharged because of her Guild membership and activity (B. A. 413–414). The Board concluded that petitioner had violated section 8 (3) and (1) of the Act (B. A. 414, 416). The Board's order directed petitioner to cease and desist from its unfair labor practices and generally from violations of section 8 (1), to reinstate Fahy with back pay, and to post notices (B. A. 416–417).

On September 27, 1940, the Board filed in the court below a petition for enforcement of its order (B. A. 5–8); petitioner answered (R. 1–26). On February 3, 1941, the court, consisting of Judges Maris, Clark, and Goodrich, handed down its opinion setting aside the order of the Board (R.

27–32). On February 7, 1941, before any decree was entered, the same three-judge court on its own motion entered an order directing reargument of the case before the court sitting *en banc* (R. 32).[4] On April 17, 1941, a court composed of the five judges in active service, with Clark, J., dissenting, handed down its opinion enforcing the Board's order except for the general cease and desist provision (R. 46–66).[5] A decree was entered accordingly on May 2, 1941 (R. 67–68). On May 9, 1941, after the decision of this Court in *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, last Term, petitioner filed a petition for modification of the decree (R. 69–73), which was denied on May 20, 1941 (R. 76).

ARGUMENT

1. This Court has granted a writ of certiorari in a case which presents the question whether the court below may validly act *en banc*. *Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue,* No. 34, this Term, certiorari granted, March 31, 1941. Accordingly, as in *Oughton* v. *National Labor Relations Board,* No. 98, this

[4] Rule 4.1 of the court below provides for such hearings *en banc*.

[5] The "work relief" clause of the back-pay order was also eliminated in accordance with *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, and the notice provision was modified to conform to the Board's present practice (R. 52).

Term, pending on petition for certiorari, the Government does not oppose either holding the present petition until the decision in the *Textile Mills* case, or granting the writ limited to review of this issue.

We respectfully submit, however, that the remaining questions do not warrant review.

2. Petitioner's contention (Pet. 6–7, 9–16) that if an employer has entered into a collective agreement with his employees, the Board thereafter lacks jurisdiction to maintain proceedings under the National Labor Relations Act to prevent employer conduct otherwise violative of the Act's prohibitions, is refuted by the express terms of the statute. Section 10 (a) of the Act provides that—

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive,* and shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement,* code, law, or otherwise. [Italics added.]

This provision makes plain the legislative purpose to apply the sanctions of the Act irrespective of any private agreement relating to unfair labor practices. Cf. *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 264–269;

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426, 435.[6]

Petitioner's related contention (Pet. 7, 24–25) that despite an employer's commission of unfair labor practices, the Board cannot institute proceedings under the Act unless there is a sufficient public interest, and that the Board's determination of that issue is subject to judicial review, is likewise untenable. The public interest is declared by Congress to exist by virtue of its announcement in section 1 of the Act that interferences with employee self-organization lead to labor disputes burdening and obstructing the free flow of commerce. The limitation suggested by petitioner is inconsistent with the unrestricted grant of power to the Board in section 10 (a) to prevent "any" person from engaging in "any" unfair labor practice affecting commerce.[7] See also section 10 (b)

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[6] Indeed, even in the absence of this explicit provision, it is unbelievable that Congress, had it intended to truncate the application of the Act in the manner suggested by petitioner, would have failed so to provide in clear and unmistakable language instead of declaring as it did, without qualification, that "It shall be an unfair labor practice for an employer" to engage in the conduct proscribed in section 8 of the Act.

[7] Petitioner does not contend that the Board must always expressly find that the public interest justifies the maintenance of a proceeding. It contends, instead, that the public interest is absent in the instant case because of the existence of a collective agreement out of which private rights and remedies flow to those against whom there has been discrimination. But in the light of the declaration of congressional

of the Act; *Jacobsen* v. *National Labor Relations Board,* 120 F. (2d) 96 (C. C. A. 3).

3. Petitioner's contention (Pet. 7, 16–24) that the Board's findings of discriminatory discharge are unsupported by substantial evidence does not call for additional review. The evidence summarized in the Statement (*supra,* pp. 3–5) affords full support for the findings, which were sustained by the court below (R. 28, 49). Compare *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461.[8]

4. Petitioner contends (Pet. 7, 25–27) that the decision below is in probable conflict with *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, last Term, in failing to direct a remand to the Board for determination (a) of the specific amount of back pay due to Fahy, and (b) of the amount which Fahy "failed without excuse to earn." In respect of (a), the claim of

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policy, it is plain that there is a permeating public interest in the correction of practices proscribed by Congress as unfair and declared by it to lead to obstructions upon the free flow of commerce. The public interest does not disappear, and the public responsibility of the Board, which has been entrusted with the task of preventing these obstructions, does not dissolve, simply by virtue of a private agreement to observe the strictures of the Act.

[8] The trial examiner (R. A. 387) and a majority of the Board (R. A. 413–414) found that the discharge was discriminatory. All the members of the three-judge (R. 28) and of the five-judge (R. 49, 53) courts held that the Board's findings were supported by sufficient evidence.

conflict is clearly without substance; there is no requirement in the *Phelps Dodge* case of computation by the Board of the specific amount of back pay due.[9] Similarly, in respect of petitioner's second claim, the present decision is consistent with the *Phelps Dodge* case. Here petitioner was "allowed to go to proof" (the *Phelps Dodge* case, pamph., p. 16) on the issue; it examined Fahy's efforts to obtain other employment (P. A. 21, 29–31), and adduced testimony that she had unsuccessfully sought to obtain two different jobs (*ibid.*). The petitioner thus failed, despite full opportunity, to show that Fahy was guilty of a "clearly unjustifiable refusal to take desirable new employment" or that she had "willfully incurred" losses (the *Phelps Dodge* case, pamph., pp. 14, 15). In these circumstances enforcement of the Board's order presents no conflict with the *Phelps Dodge* decision.[10]

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[9] Such a computation, indeed, would be impossible at this time; the computation cannot be made until petitioner has complied (which it has not) with the Board's order, for the back pay runs until the date of an offer of reinstatement (B. A. 417).

[10] Petitioner claims (Pet. 27) conflict with the subsequent decision of the court below in *National Labor Relations Board* v. *Suburban Lumber Co.*, decided June 30, 1941 (C. C. A. 3). That case apparently turned on facts which, in the court's view, disclosed (unlike the facts in the principal case) failure by the employees to mitigate their damages. Moreover, insofar as the *Suburban Lumber* case applies common law mitigation of damage principles, it is contrary to the *Phelps Dodge* case in which the Court expressly

5. Although the court below set aside the general cease and desist order (R. 51–52), petitioner still complains (Pet. 7, 27–29) of the provision restraining it from discouraging membership in the Guild or any other labor organization by discrimination in regard to hire or tenure of employment. Since the court sustained the Board's findings that petitioner, by discriminatory discharge, had violated the Act, the limited cease and desist order enforced by the court falls clearly within the principle that "the Board is free to restrain the practice and other like or related unlawful acts." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436. Upon like findings identical orders have been sustained without exception by this and all other reviewing courts.

Petitioner's additional objection (Pet. 7, 29) to the notice provision of the order is similarly unsound. The notice directed by the Board is indisputably an "appropriate bulletin" (H. Rept. No. 1147, 74th Cong., 1st Sess., p. 24) which the Board may validly require to convey to the employees "the knowledge of a guarantee of an unhampered right in the future to determine their labor affiliations." *National Labor Relations Board* v. *Falk*

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disclaimed application of the doctrine of "minimization of damages." Any conflict between the *Phelps Dodge* and *Suburban Lumber* cases would more properly be resolved in the latter case than in the present one, which is entirely consistent with the *Phelps Dodge* case.

Corp., 308 U. S. 453, 463; see also *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 263, 268, 271.[11]

CONCLUSION

With the exception of the power of the court below to sit *en banc*, no question requiring review is presented. If the writ be granted, it is suggested that it be limited accordingly.

Respectfully submitted.

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AUGUST 1941.

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[11] Petitioner is mistaken in asserting (Pet. 29) that the form of notice required in this case is a "departure from the Board's usual practice." See *Third Annual Report of the National Labor Relations Board* (Gov't Printing Office, 1939), p. 214.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 307

NEWARK MORNING LEDGER COMPANY, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR NEWARK MORNING LEDGER COMPANY, PETITIONER

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REPLY MEMORANDUM FOR NEWARK MORNING LEDGER COMPANY, PETITIONER

Petitioner respectfully submits this reply memorandum, the argument being presented hereunder in the same order as the questions are presented in the original petition (pp. 6-7).

1. *The constitution of the Circuit Court of Appeals:* The Government does not oppose review of this question (Mem. pp. 6-7).

2. *The jurisdiction of the Board during the existence of a true collective bargaining contract:* The Government's position is opposed to the voluminous authorities and extensive source materials referred to in the petition and in the dissenting opinion of Judge CLARK in the Court below. No effort has been made in the Government's Memo-

randum to dispute, distinguish or deny the soundness of these authorities, or to submit any like material in opposition.

The Government relies chiefly, if not solely, upon the language of Section 10 (a), pressing for a strictly literal interpretation of that section. Stressing the word "agreement" the Government contends that it was the legislative purpose to apply the sanctions of the Act irrespective of any private agreement. This argument completely ignores the legislative history of Section 10 (a) which, as pointed out in the petition (pp. 14-15), establishes that the "agreement" referred to in that Section is not a private collective bargaining contract, but the "President's Re-employment Agreements" under the National Industrial Recovery Act (U. S. C. Supp. VII, Title 15, Secs. 701-712), and only to the extent that these agreements prescribe "means of adjustment or prevention". Also, the legislative history reveals that the whole purpose of the second sentence of Section 10 (a) was merely to centralize in the Board all of the administrative functions under the Act, thereby avoiding the confusion and duplication which existed under the National Industrial Recovery Act.

The Board is empowered to prevent "unfair labor practices". That expression is not a term of general application. It is a statutory definition of the practices listed in Section 8 and refers to the prohibited employer tactics which tend to deprive employees of their rights under Section 7. By a collective bargaining contract the employee's rights under Section 7 are confirmed and protected. A discharge in violation of that agreement is not an "unfair labor practice" within the statute. As pointed out in the original opinion in the Court below such a discharge "cannot possibly have the effect of interfering with, restraining, or coercing the employees in exercising a right of collective bargaining which has already been fully and successfully exercised by them" (R. 31).

Since the filing of the petition herein our attention was called to the recent decision in *N. L. R. B.* v. *Air Asso-*

ciates, Inc., ... F. (2d) ....., decided July 9, 1941, in the Circuit Court of Appeals, Second Circuit. There the Court, in an opinion by FRANK, J., held that even in the absence of a collective agreement a discharge was not an unfair labor practice within the Act, although made with the *purpose* of discouraging membership in a labor organization unless it was shown that it had the *effect* of discouraging such membership. We submit that where there is an existing valid collective contract, a discharge in violation of such a contract cannot have the *effect* of discouraging membership in a labor organization within the meaning of the statute since the agreement itself is the best evidence of effective employee organization, and a discharge in violation thereof is immediately and adequately remediable through the courts. This private remedy is an effective deterrent against discharge for union activity rendering unnecessary and inapplicable the sanctions under the statute.

Finally, we again urge that the very fact that the Court below wrote two diametrically opposite opinions on this very question of itself warrants review by this Court.

3. *The lack of substantial evidence to support the Board's findings:* The decision in *N. L. R. B.* v. *Air Associates, Inc., supra*, has an immediate and direct relationship to this question. In the language of the Court in that case:

> "Section 8 (3) requires that the discrimination in regard to tenure of employment have both the purpose and *effect* of discouraging union membership. The Board made a clear finding that the *purpose* of the discharges was to discourage membership in the union, and we think that finding was sufficiently supported by evidence to the effect that (1) the discharges, which preceded the reinstatement of the committeemen by one day, were not in fact necessary, and (2) anti-union statements were made to the two men at the time of their discharges. But we can discover no satisfactory

> explanation by the Board which would permit a finding that the unlawful purpose had the *effect* required by the act."

In this case not only is there no evidence that Fahy's discharge had the *effect* of discouraging union membership, the record affirmatively shows that it did not have that effect. The collective agreement which was in existence at the time of Fahy's discharge has been renewed year after year since then. The union has remained in continuous existence and has continued to function as the bargaining agent for the editorial employees of petitioner. Hence, we respectfully contend that this fact, in addition to the matters set forth in the petition, establishes that the Board's finding that Fahy's discharge discouraged membership in the Guild is without substantial foundation.

4. *The absence of any public interest:* This subject is treated by the Government as part of the issue pertaining to the jurisdiction of the Board during the existence of a collective bargaining contract, discussed under subdivision "2" in the Government's Memorandum (p. 8). The Government assumes that they are related questions. In fact, they are not. The only connection, in the instant case, is that the existence of the collective contract which is one of the factors establishing the absence of a public interest also establishes the Board's lack of jurisdiction.

The Government's contention is that every violation of the Act, no matter how insubstantial, *ipso facto* affects the public interest, and that the exercise of jurisdiction by the Board rests in its own untrammeled discretion beyond judicial review. This contention conflicts directly with the holding of this Court in *Federal Trade Commission* v. *Klesner,* 280 U. S. 19. Also, it is in conflict with the view expressed in the prevailing opinion in the Court below in the following quotation (R. 51):

> "The jurisdiction is not to be exercised unless in the opinion of the Board the unfair labor practice complained of interferes so substantially with

> the public rights created by Section 7 as to require its restraint in the public interest. As we have seen, the mere fact that a private right of an employee has been infringed by the act of an employer is not of itself sufficient to bring the Board's powers into play."

The public interest which Congress, in Section 1 of the Act declared to exist, pertains only to the period preceding collective bargaining. It is during that period that the employees have neither private rights nor private remedies. And it is during that period that there exists the need for the public remedy which is the basis of the public interest. As Judge CLARK pointed out in his dissenting opinion, it is the "unredressed" destruction of employees' rights which the Act was intended to eliminate (R. 57).

The case of *Jacobsen* v. *N. L. R. B.*, 120 F. (2d) 96, cited by the Government, is not in point. There, by way of dictum, the Court referred to its lack of authority to review the Board's determination, in its discretion, *not to proceed.*

5. *The directions in the order pertaining to the back pay:* It appears to be the position of the Government that the *Phelps Dodge* case is not applicable for the reason that Fahy was not guilty of a "clearly unjustifiable refusal to take desirable new employment". We respectfully submit that the rule established by the *Phelps Dodge* case, if interpreted as the Government urges, could readily become wholly inoperative. By the simple expedient of making no efforts to obtain other employment, a discharged employee could never be guilty of a "refusal to take desirable new employment".

The Government's contention that, in the *Phelps Dodge* case, this Court "expressly disclaimed application of the doctrine of 'minimization of damages'" (Mem. p. 10, footnote 10) is not sustained by the opinions in that case. The prevailing opinion, and even more clearly, the dissenting opinion of Mr. Justice MURPHY, we believe, indicate an acceptance of that doctrine.

With respect to whether or not the Board should compute the amount of back pay, we respectfully submit that the Government's contention that there is no such requirement in the *Phelps Dodge* case is opposed to this Court's explicit holding that: "The matter should have been left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings."

The Government's claim of administrative difficulties (Mem. p. 10, footnote 9) was disposed of by this Court in the *Phelps Dodge* case.

6. *The form of the Board's Order:* The Government does not clearly state the petitioner's position. The petitioner's objection is not addressed to the provision in the Order restraining it from discouraging membership in the Guild. It is directed to that part of the Order which purports to restrain the petitioner from discouraging membership in "any other labor organization". So far as the opinion discloses, that precise situation was not present in *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, but it is significant that the Order in that case restrained the employer from interfering with the Guild only; it did not include "any other labor organization". The fact is that there are other labor organizations whose members are employed by petitioner, and this fact is not controverted by the Government. The rights and relations between the petitioner and these other unions were not involved in this proceeding, and, of course, were not litigated. There should, therefore, be no reference to them in the Order which, by its terms, creates the implication that petitioner has in some way violated the Act in its dealings with such other unions.

With particular reference to Section 2 (c) of the Board's Order (R. 68) there appears to be a difference between the Government and the petitioner with respect to whether the Board followed its usual practice. The Government (Mem. p. 12, footnote 11) suggests that the petitioner is mistaken in asserting that the order in this respect is

a departure from the Board's usual practice, and refers to the Third Annual Report of the National Labor Relations Board. Petitioner respectfully submits that it is not mistaken and that it is, in fact, the Board that appears to be under a misapprehension. This is not only confirmed by the very specific language of this Court in the *Express Publishing Co.* case, *supra,* but is also confirmed in the Fifth Annual Report of the National Labor Relations Board, page 78.

The part of Section 2 (c) of the Order to which petitioner excepts appears to concern itself not with a violation of Section 8 (3) of the Act, but rather with a violation of Section 8 (1) of the Act. And it is especially to be noted that in the present case all violations under Section 8 (1) (except as incidentally involved in the discharge of Fahy) were specifically eliminated by the dismissal of such charges at the close of the Board's case (Bd. App. 386).

Moreover, this portion of "2(c)", by affirmative statement, carries the same implication of confession of guilt that was condemned by the courts in considering the negative cease and desist provisions.

Conclusion

The conclusion expressed by the Government (Mem. p. 12) that, except with respect to the power of the Court below to sit *en banc,* no question requiring review is presented by the petition appears to be inconsistent with the position publicly taken by the Board in a press release issued at the time of the reargument in the Court below. In the opening paragraph of that release the Board declared that this case "raises an important question of jurisdiction under the National Labor Relations Act". Excerpts from that release are set forth in the appendix, *infra.*

Respectfully submitted,

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